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No. A 94-651 (6)

In the
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1994

EXPORTADORA DE SAL, S.A. DE C.V., *Petitioner*,

v.

HIROKO SUGIMOTO, et al., *Respondents*

On Petition for a Writ of Certiorari to the
United States Court of Appeals
for the Ninth Circuit

PETITIONER'S REPLY TO RESPONDENTS' OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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RULE 29.1 LISTING

Petitioner EXPORTADORA DE SAL, S.A. DE C.V., is a foreign corporation, owned in majority part by the Government of the United States of Mexico, and has no parent corporation and no subsidies or affiliates which issue shares to the public.

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EXPORTADORA DE SAL, S.A. DE C.V., hereby submits its reply to respondents' brief in opposition to EXPORTADORA's petition for a writ of certiorari.

I

EXPORTADORA IS NOT HERE CONTESTING THE DISTRICT COURT'S FINDINGS OF FACT

Because respondents have accused EXPORTADORA of misstating the facts, this reply will begin with a brief discussion of some of the important findings of fact related to the jurisdiction determination. However, EXPORTADORA is not seeking this Court's review of factual findings. EXPORTADORA seeks review of an issue of law -- whether, given the facts found by the courts below, jurisdiction could properly be exercised over EXPORTADORA.

Respondents' claims arise out of the crash of an airplane on a flight from Guerrero Negro, Mexico, to Tijuana, Mexico. Contrary to respondents' statement in their opposition, the decedents were in Guerrero Negro as a result of decisions made in Mexico and Japan. The District Court found that the requests for EXPORTADORA's assistance in arranging the decedents' travel to Guerrero Negro came by telexes from the Tokyo office of the Mitsubishi Corporation (App. 17-21, F. 11-13, 15, 17-18)[1]. These telexes were sent to EXPORTADORA's Mexico City and Guerrero Negro offices, from which EXPORTADORA forwarded its confirmation of the travel arrangements (Id.). Certainly, EXPORTADORA's San Diego office was involved in the transportation of the decedents -- after leaving Japan, they had a brief stop in San Diego, where they were met by EXPORTADORA employees and taken to the Tijuana airport to catch a flight to Guerrero Negro. However, the District Court did not, and could not, find that any of the actual decisions involving the decedents' travel arrangements were made in San Diego --

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[1]References to the previously-filed Appendix will be cited herein as "App.," followed by the appropriate page and, when referring to the District Court's "Findings and Conclusions," a finding ("F") number.

those decisions were all made in Mexico and Japan.[2]

There was no evidence that EXPORTADORA was paid for any of the decedents' travel arrangements; the District Court found that the transportation was all at EXPORTADORA's expense (App. 19, 21, 24, F. 14, 18, 32). The Court of Appeals in its first decision did find that EXPORTADORA was motivated by a more indirect form of potential compensation – the facilitation of "future commercial dealings" and "maintaining good will." However, this examination of EXPORTADORA's alleged "purpose" for arranging the transportation violates 28 U.S.C. § 1603(d), which specifically provides that the "commercial character of an activity shall be determined by reference to the nature of the course of conduct or particular transaction or act, rather than by reference to its purpose."

It is undisputed that decedents' journey to Guerrero Negro was without incident. Respondents' action is based on what occurred on the return flight – the crash of the Aviones plane on approach to the Tijuana Airport. It is undisputed that the decision to use Aviones for the flight was made in Mexico. The District Court found that EXPORTADORA's Guerrero Negro office selected Aviones when it learned that the company plane would not be available (App. 23-25, F. 27, 31, 33).

The District Court found that "Aviones had provided Exportadora with safe and reliable air service on charter flights between Guerrero Negro and Tijuana," and that Aviones was "licensed, qualified and fully competent..." (App. 24-25, F. 32, 34). Further, and contrary to respondents' misrepresentation, the

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[2]The Court of Appeals in its first opinion held that it was "immaterial" where the actual decisions regarding the travel arrangements were made – "the San Diego office was involved in arranging the trip, no matter where the decisions were made." (App. 97, n.2). However, the Court of Appeals in its first decision completely overlooked the requirement that, for jurisdiction to exist under the first clause of 28 U.S.C. § 1605(a)(2), the action must be "based upon" the "commercial activities" of the defendant in the United States. And, respondents' action was not "based upon" the activities of the San Diego office.

pilot provided by Aviones to perform the flight "was a qualified pilot for the flight," and was properly licensed to perform instrument landings (App. 17-18, F. 43, 46).

The flight was scheduled to fly directly from Guerrero Negro to Tijuana, Mexico (App. 24, 30, F. 31, 47) -- there was no evidence that the flight was ever scheduled to fly into United States airspace. The Aviones pilot may have been aware that the Tijuana airport employs a poor weather approach which swings over United States territory, but there was no evidence, and no finding, that anyone dealing with the decedents' travel arrangements at EXPORTADORA was aware of this approach. Further, while some of the weather reports available in the United States may have forecast poor weather in Tijuana, the evidence at trial established that the reports relied on by the pilot -- the weather reports which were available in Mexico -- did not predict poor visibility conditions.

Consequently: (1) there was no evidence that EXPORTADORA intended the flight to enter United States airspace; (2) there was no evidence that EXPORTADORA was aware that a flight to Tijuana could involve entry into United States airspace if bad weather was encountered; and (3) there was no evidence that anyone at EXPORTADORA was aware that this particular flight would encounter bad weather in Tijuana. Further, the District Court found that EXPORTADORA told the pilot that, "if conditions were not right in Tijuana airport, the pilot could proceed to Mexicali." (App. 30, F. 47).

The District Court specifically held that Aviones was an independent contractor (App. 31, 48, F. 49, 98, 99). And, EXPORTADORA had no control over the flight once it left Guerrero Negro. The District Court found that:

> [T]he conduct of the flight was under the control of the Aviones pilot...The decision to undertake the flight, how the flight would be conducted and whether under the restricted conditions a landing at the Tijuana airport should be attempted rested with the pilot, not with Exportadora.

(App. 60, F. 119).

Respondents' offensive statement that "[p]eople were killed by Exportadora's negligent commercial activity..." is completely erroneous. There has never been any finding that EXPORTADORA was negligent. The District Court found that the accident was the result of the Aviones pilot's negligence (App. 45, 60 F. 93, 119). While EXPORTADORA was held, for "policy" reasons, to have vicarious liability for decedents' death, it has never been held to have done anything wrong.

II

RESPONDENTS' ACTION IS "BASED UPON" EVENTS WHICH OCCURRED IN MEXICO

The only basis for jurisdiction found by the courts below is the first clause of 28 U.S.C. § 1605(a)(2), which creates an exception to sovereign immunity where "the action is based upon a commercial activity carried on in the United States by the foreign state." The Court of Appeals' first decision in this case, on an interlocutory appeal from the denial of a motion to dismiss, held that: "The FSIA requires two components for this exception to apply: (1) that the foreign entity be engaged in commercial activity, and (2) that the commercial activity have substantial contact with the United States." (App. 95). The Court of Appeals held that these "two components" were satisfied in this case, because: (1) EXPORTADORA was engaged in "commercial activity" when it arranged for the decedents' transportation; and (2) this "commercial activity" had a "substantial contact" with the United States because EXPORTADORA's San Diego office was involved in the transportation of the decedents.

Saudi Arabia v. Nelson, 507 U.S. ____, 113 S.Ct. 1471, 123 L.Ed.2d 47 (1993), made it clear that the Court of Appeals had completely overlooked an essential third requirement for jurisdiction under the first clause of § 1605(a)(2) – that the action must be "based upon" the commercial activities performed in the United States. In its second decision, the Court of Appeals acknowledged the "based upon" requirement. However, the Court completely ignored its prior decision's reliance on the alleged

"commercial activity" of EXPORTADORA's San Diego office. Instead, the Court held that jurisdiction existed because the Aviones flight was itself "commercial activity," and respondents' action was "based upon" the Aviones pilot's alleged negligent acts while in United States airspace.

However, the alleged negligence of the Aviones pilot was not commercial activity of EXPORTADORA which had a "substantial contact" with the United States. The flight was scheduled to fly directly to Tijuana, and was only over United States territory because poor weather in Tijuana led to the pilot's use of an approach which briefly -- for only a few minutes out of the two hour flight -- swung over the United States. Further, at the time the decision to enter United States airspace was made, and at the time the negligent acts were allegedly committed, the flight was in the complete control of a qualified independent contractor. Consequently, while the second Court of Appeals decision does consider the "based upon" requirement, it neglects the equally important requirement that respondents' action be based upon commercial activity of EXPORTADORA which has a "substantial contact" with the United States.

In their opposition, respondents argue that: (1) while neither Court of Appeals decision so held, the evidence would support a finding that respondents' action was "based upon" the commercial activity of EXPORTADORA's San Diego office; (2) a non-delegable duty to decedents arose out of the commercial activity of EXPORTADORA's San Diego office; and (3) a "substantial contact" with the United States exists because the plane crashed there. These after-the-fact justifications fail to support the exercise of jurisdiction over EXPORTADORA.

A. RESPONDENTS' ACTION WAS NOT "BASED UPON" THE ACTIVITIES OF EXPORTADORA'S SAN DIEGO OFFICE.

The Court of Appeals in its first decision did not hold that respondents' claims were based upon the commercial activities of EXPORTADORA's San Diego office. Nothing happened during the San Diego office's "commercial activities" which would allow

the filing of any claim against EXPORTADORA. The decedents were met in San Diego as planned, and were transported from the San Diego office to the Tijuana airport, and from the Tijuana airport to Guerrero Negro, without incident.

Indeed, the Court of Appeals itself clearly did not believe that respondents' action was "based upon" the events in San Diego. In its second decision, the Court's jurisdiction analysis nowhere mentions the activities of the San Diego office in finding jurisdiction. Rather, the Court found jurisdiction to exist based on EXPORTADORA's vicarious liability for the Aviones pilot's negligence while flying in United States airspace; this vicarious liability was held to arise out of events which occurred in Mexico.

B. ANY "DUTY" TO DECEDENTS AROSE IN MEXICO.

Respondents next argue that the crash of the airplane breached a non-delegable duty which arose out of the "commercial activities" of EXPORTADORA's San Diego office. This argument is also refuted by the Court of Appeals' second decision -- the jurisdiction analysis in that opinion makes no mention of the supposed "commercial activity" of the San Diego office. It simply finds that the Aviones pilot was flying in United States airspace when he committed negligent acts, and therefore that there was "commercial activity" in the United States. To the extent that the Court of Appeals found that EXPORTADORA had a duty to decedents, that duty arose out of events which occurred in Mexico.

Specifically, the Court held that EXPORTADORA was liable for the acts of independent contractor Aviones (1) because EXPORTADORA "controlled the transportation offered to business visitors to its plant and company town" (Guerrero Negro), and (2) because "policy" factors indicated that EXPORTADORA should be held liable for the independent contractor's negligence: EXPORTADORA selected the contractor, could insist on a contractor which was financially responsible, could demand indemnity from the contractor, and could insure for the risk as a part of its business. These factors obviously have nothing to do with the San Diego office's assistance with the decedents'

transportation; they have everything to do with EXPORTADORA's acts and operations in Mexico. Consequently, the "duty" to decedents' upon which EXPORTADORA's liability was based arose in Mexico.

C. THE AVIONES PILOT'S NEGLIGENCE WAS NOT "COMMERCIAL ACTIVITY" OF EXPORTADORA HAVING A "SUBSTANTIAL CONTACT" WITH THE UNITED STATES.

The Court of Appeal's second opinion finds that respondents' action is "based upon" the negligence of the Aviones pilot in United States airspace. However, this finding does not suffice – as the Court held in Saudi Arabia v. Nelson, supra, 113 S.Ct. at 1477, the "action must be 'based upon' some 'commercial activity' by [defendant] that had 'substantial contact' with the United States..." Here, the pilot's negligent acts were not "commercial activity" of EXPORTADORA which had a "substantial contact" with the United States. This is because the "commercial activity" was not performed by EXPORTADORA, but by an independent contractor, and because that independent contractor's entrance into United States airspace was neither directed nor expected by EXPORTADORA.[3]

Respondents cite cases dealing with jurisdiction based upon an agent's commercial activities. However, those cases all involved acknowledged agents of the foreign sovereign, who had been specifically engaged for the purpose of conducting commercial activities in the United States. None of those cases involved a situation similar to that here present, where (1) Aviones was not an agent of EXPORTADORA, but rather was held to be acting as an independent contractor, and (2) the contracted for

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[3]Respondents cite Olsen by Sheldon v. Govt. of Mexico, 729 F.2d 641 (9th Cir. 1984), for the proposition that a flight's entrance into United States airspace on approach to the Tijuana airport is "neither accidental nor fortuitous." However, the Court in that case was not dealing with subject-matter jurisdiction, but with personal jurisdiction, where the plane was owned and operated by the Mexican Government.

services did not provide for, contemplate, or require, any contact with the United States -- the flight was scheduled to fly directly from Guerrero Negro to Tijuana.

EXPORTADORA is not arguing that liability can never be attributed to a foreign sovereign based on the acts of an independent contractor, but that jurisdiction cannot be based on such acts where the foreign sovereign did not intend or expect the independent contractor to have any contact with the United States. In such circumstances, the assertion of jurisdiction over EXPORTADORA based solely on the acts of independent contractor Aviones is certainly improper.

III

NO ALTERNATIVE GROUNDS FOR JURISDICTION EXIST

Respondents have urged alternative grounds for jurisdiction, but the courts below have never considered, or ruled on, any of those grounds -- jurisdiction has only been found under the first clause of § 1605(a)(2). Despite respondent's claim that "Exportadora's statement that no other exceptions were considered is false," respondents cite no portion of any of the lower courts' decisions which rule on any alternative basis of jurisdiction -- no such citations exist. And, insofar as the record has not been developed regarding the potential applicability of these exceptions, they cannot properly be advanced in this Court.

Respondents' representation that EXPORTADORA "waived sovereign immunity in opening statement," and that EXPORTADORA was not denied the opportunity of contesting jurisdiction at trial, is false. Counsel never stated during opening argument that EXPORTADORA stipulated to subject-matter jurisdiction, or that it waived sovereign immunity. However, immediately after opening statements, the District Court specifically ruled that it would not reconsider the Court of Appeals' prior determination that jurisdiction existed in the case, and that it would not reconsider any of the Court of Appeals' findings of fact in support of that determination. "Those findings are critical to the conclusion reached by the Court of Appeals, and

I will not review [them]." Reporter's Transcript, I-48 (lines 10-12); see also App. 16, F. 7. The District Court reaffirmed that ruling on a number of occasions.

In light of the District Court's ruling, EXPORTADORA's decision not to proffer evidence at trial regarding the absence of jurisdiction cannot be seen as a waiver.[4] To the contrary, EXPORTADORA contested jurisdiction at every available opportunity – indeed, its first responsive pleading was a motion to dismiss based on the absence of jurisdiction under the FSIA, and it appealed the denial of that motion to the Ninth Circuit.

It should also be noted that the Courts have uniformly held that jurisdiction under the FSIA is a "preliminary determination," to be made at "the threshold of every action." Verlinden B. V. v. Central Bank of Nigeria, 461 U.S. 480, 494, 103 S.Ct. 1962 (1983); Siderman de Blake v. Republic of Argentina, 965 F.2d 699, 706 (9th Cir. 1992). Obviously, a claim of waiver of immunity based solely on events which occurred after trial began cannot be made "at the threshold" of the action. Petitioner has been unable to find any cases holding that a waiver of sovereign immunity can be based on conduct at trial; indeed, a number of courts have specifically observed that the "federal courts have been reluctant to find a waiver from the nature of a foreign state's participation in litigation." Rodriguez v. Transnave, Inc., 8 F.3d 284, 289 (5th Cir. 1993); Frolova v. Union of Soviet Socialist Republics, 761 F.2d 370, 378 (7th Cir. 1985).

This case involves foreign plaintiffs suing a foreign sovereign, and subject-matter jurisdiction is therefore based solely on the alleged absence of immunity under the FSIA. See

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[4]Waiver of immunity was not raised in the pre-trial order; if it had been, petitioners' counsel would have asserted the jurisdiction arguments at trial despite the District Court's ruling. Appellate courts will not review theories not raised in the pre-trial order if their inclusion in the order might have caused the opposing party to try its case differently. See Seymour v. Coughlin Co., 609 F.2d 346, 349 (9th Cir. 1979); United States v. Patrin, 575 F.2d 708, 712 (9th Cir. 1978).

Verlinden B.V. v. Central Bank of Nigeria, supra. That being the case, to allow statements at trial to be the basis for finding a waiver of immunity would be tantamount to allowing the parties to create jurisdiction in the Federal courts by stipulation.

EXPORTADORA has continuously asserted its sovereign immunity defense, beginning with its first appearance in this action, and none of the decisions in this case have found any "waiver" of immunity; indeed, none of the decisions considered any of the alternative bases for jurisdiction now proffered by respondents. EXPORTADORA submits that the facts of this case establish that jurisdiction cannot be found under any of those alternative bases. It is also clear, however, that those alternative bases are not ripe for consideration at this time.

IV

CONCLUSION

The Court of Appeals' opinion has expanded the jurisdictional reach of the United States courts not only beyond the borders of this country, but beyond the limits set forth by Congress in the Foreign Sovereign Immunities Act. In so doing, the Court of Appeals has allowed the United States courts to interfere with legal matters which arose in, and which should be resolved in, Mexico. EXPORTADORA submits that this case presents important jurisdictional issues which can only be resolved by this Court, and EXPORTADORA therefore requests that the Court grant the instant petition for a writ of certiorari to the Ninth Circuit Court of Appeals.

Respectfully submitted,

Dated: November 11, 1994

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